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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

MICHAEL KOEHLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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28 pp

QUESTIONS PRESENTED

Whether the applicability of the four-level "in-the-business" enhancement, which doubles the base-level for trafficking in stolen property, ought to depend upon the frequency, regularity, and duration of a defendant's illicit transactions or, instead, upon the single factor of whether the defendant purchased from the thief, rather than stole himself, the property he had trafficked?

Whether, under its responsibility to supervise the proper administration of the Criminal Justice Act, where the district court learns that assigned counsel has just been arrested for a felony cocaine offense and requires in-patient treatment, it bears a sua sponte obligation to conduct an on-the-record inquiry (a) to determine the continued fitness of assigned counsel and (b) to assure that an indigent defendant is aware of the implications of his assigned counsel's arrest upon the ability to defend?

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MICHAEL KOEHLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-titled proceeding on May 25, 1994, which affirmed petitioner's judgment of conviction; a petition for rehearing was denied on July 1, 1994.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 24 F.3d 867, and is reprinted in the Appendix hereto, beginning at p. 1a, *post*. The order denying rehearing in reprinted in the Appendix at p. 10a, *post*.

JURISDICTION

Petitioner was indicted, tried and convicted in the United States District Court for the Eastern District of Michigan of one count of conspiracy to transport stolen auto parts [18 U.S.C. §§371, 2314]; one count of

knowingly using a counterfeit mark while trafficking in auto parts [18 U.S.C. §2320]; and one count of trafficking in counterfeit labels and containers [18 U.S.C. §2320]. Petitioner's appeal resulted in an affirmance on May 25, 1994, and a petition for rehearing was denied on July 1, 1994.

The jurisdiction of this Court to review the judgment is invoked pursuant to 28 U.S.C. §1254(1). This petition is filed within the time permitted by Rule 13.1 of this Court.

STATEMENT OF THE CASE

In the late 1980's, an FBI agent began an undercover sting operation in Michigan designed to thwart the trade of counterfeit and stolen Big-Three automotive parts. In March of 1989, the agent came upon an advertisement flyer which listed, amongst the forty lots for sale, a small quantity of axles at a price which caught the agent's attention.

The flyer had originated with the petitioner, a dealer in surplus auto parts of all sorts for many years, and who had no prior criminal record of any kind. The agent, pretending to be in the same business, phoned Koehler at his work place, which was located in a suburb of New York City, and developed a relationship with him. Though the two men met only twice (once by accident at a trade fair), the agent recorded more than 120 phone calls with petitioner, most which he had initiated, beginning in March of 1989 and ending in January of 1991 with petitioner's arrest.

Of these tapes, the government played about 40 to the jury. A number of these conversations recorded discussions of the routine matters of surplus parts business--what items were available, their quality and condition, their packaging and shipment, their cost, and which parts dealers

were trustworthy or not.

Out of all the talk, the agent and Koehler consummated only four transactions with one another. In April of 1989, Koehler sold the agent $3850 worth of axles, allegedly stolen; in May of 1989, the agent sold Koehler a $21,000 load of allegedly stolen spark plugs [they had in fact been provided to the FBI by General Motors]; in February of 1990, the agent sold Koehler 89 reconditioned air conditioner compressors, with counterfeit labels affixed, for $2,670. And in April of 1990, after months of pestering by the agent and procrastination by Koehler, Koehler supplied the agent--at no charge--boxes and counterfeit GM labels.

At trial, the key evidence came from snippets of the tapes, and from several witnesses, including the agent, who testified about the pricing, packaging, and distribution practices of legitimate auto parts which, when compared to the four transactions charged against petitioner, tended to show that he knew he was engaging in illicit trafficking.

The defense was in the hands of counsel assigned pursuant to the Criminal Justice Act. Through petitioner's testimony and through other witnesses in the surplus parts business, it attempted to show that (a) the axles were not stolen, but had been acquired through legitimate channels; (b) the prices of the transactions were within the range of legitimately traded parts; (c) the transcripts used by the government were in fact ambiguous as to petitioner's knowledge of anything illicit about the merchandise he bought from or sold to the agent; and (d) that as to the counterfeit labels petitioner finally sent to the agent, petitioner had been entrapped by the agent.

Petitioner was convicted as charged, and was sentenced under the guidelines to a term of 24 months, plus a special assessment fee of $150.00. He has been free on personal recognizance bond since his arrest.

REASONS FOR GRANTING THE WRIT

I. THERE IS CONFLICT IN THE CIRCUITS OVER THE PROPER ANALYSIS TO BE USED TO DETERMINE THE APPLICABILITY OF SENTENCE GUIDELINES' FOUR-LEVEL "IN THE BUSINESS" ENHANCEMENT [U.S.S.G. §2B1.2(B)4(A)] FOR STOLEN PROPERTY OFFENSES

Petitioner's sentence was raised four levels under the Guidelines' "in the business" enhancement [U.S.S.G. §2b1.2(B)4(a)] for stolen property offenses. The government proved only two stolen property offenses,* but the court of appeals, relying on its previous ruling in *United States v. Warshawsky* [20 F.3d 204 (6 Cir.1994)], upheld the enhancement on the ground that appellant acted as a "fence" in the two proven transactions, thereby "encouraged others to steal", and thus warranted the enhancement [*United States v. Koehler*, at A8].

There is sharp disagreement in the courts of appeal over the proper analysis to be used for determining the applicability of the "in-the-business" enhancement. Two circuits employ a nuanced multi-factored analysis whose core emphasizes the frequency, regularity, and

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* The "in the business" enhancement applies only to *stolen* property offenses, not to counterfeit-related offenses. The Government adduced evidence of only two stolen property transactions at trial, both occurring within a 10-week span. While a number of the taped conversations between petitioner and the agent revealed that petitioner was aware of the various dishonest schemes practiced by others in the surplus parts business, the government adduced no evidence show that petitioner himself engaged in stolen property transactions beyond the two transactions proved at trial.

sophistication of stolen property dealings to determine whether the operation was businesslike. *United States v. St. Cyr*, 977 F.2d 698, 703 (1 Cir.1992); *United States v. King*, 21 F.3d 1302 (3 Cir.1994). Similarly, two additional circuits have interpreted an analogous "in the business" guideline [§2T1.4(b)(3) for preparing false and fraudulent tax returns] to require, at the minimum, a "regularity" of illegal conduct. *United States v. Phipps*, 29 F.3d 54 (2 Cir.1994); *United States v. Welch*, 19 F.3d 192, 195-196 (5 Cir.1994).

By contrast, two circuits, including the Sixth, have seized upon only a single factor - whether the defendant himself stole the property he later sold - to determine the applicability of the enhancement. According to this view, the defendant who purchased the property he sold warrants the enhancement, but the defendant who stole the property he sold does not. *Warshawsky, supra*, 20 F.3d at 214 et seq.; *United States v. Esquivel*, 919 F.2d 957, 959 (5 Cir.1990).

The Seventh Circuit is in something of a muddle. Originally, it employed the test subsequently adopted by the Sixth Circuit in *Warshawsky [United States v. Braslawsky*, 913 F.2d 466, 468 (7 Cir.1990)], but more recently has emphasized the regularity and frequency of stolen property transactions [*United States v. Connor*, 950 F.2d 1267, 1275 (7 Cir.1991).

The *Warshawsky/Esquivel* distinction between the stolen property seller who has purchased the stolen property and the seller who had stolen it himself is purportedly explained by the idea that the former's purchase encourages others to commit crimes (*e.g.* larceny), while the latter does not. But in terms of "encouraging others to commit crimes", there is no meaningful distinction between the two. The seller who has stolen the property in the first instance encourages others to buy stolen property, that is, encourages 'fencing', itself a crime. And, in terms of over-

all blameworthiness, the seller-thief has actually committed two rather distinct crimes (the original theft and the sale of the stolen property), whereas the fence has committed but one. Stealing and fencing are thus arbitrary and infinitely repeating points on the continuum of larceny, and to base the applicability of the enhancement on such a distinction, while it is concededly simple, seems almost whimsical.

In the final analysis, rather than seize upon a single apparently arbitrary factor [how the seller obtained the property], the most sensible way to apply the "in the business" enhancement is to follow the First and Third Circuits' multi-facetted approach, and search for indices of regular criminal activity that show businesslike conduct of an ongoing stolen property operation, as opposed to the occasional opportunistic venture. Only the former merits the 4-level enhancement, which, because it doubles the base-offense level, must be reserved for the exceptional, not the routine, case, lest the enhancement displace the base level as the touchstone of stolen property sentences.

This issue is no abstraction. The most recently available data show that between 1989 and 1992 about 2100 people have been sentenced in district courts' for stolen property offenses under the guidelines [1993 Sourcebook of Criminal Justice Statistics, Table 5.22 (Dept. of Justice: 1994)], at a steady rate averaging around 500 annually. Supreme Court resolution of lower court conflict over the "in the business" enhancement will have impact far beyond petitioner's case.

II. THE COURT OF APPEALS HAS TRIVIALIZED THE SUPERVISORY OBLIGATION OF THE DISTRICT COURTS TO ADMINISTER THE CRIMINAL JUSTICE ACT TO ENSURE THE PROTECTION OF SIXTH AMENDMENT VALUES

Petitioner was indicted on July 30, 1992, and filed a financial affidavit in connection with a request that counsel be assigned under the Criminal Justice Act. On August 27, 1992, Stevens J. Jacobs, Esq. was assigned to represent him. There followed a series of adjournments while plea negotiations were explored.

Matters took a jarring turn when, on November 20, 1992, Mr. Jacobs was arrested by state authorities in Bay City, and charged with possession of cocaine. Although all participants were apparently informed of this shocking development a few days later, the district judge [Clevland, J.] conducted no inquiry whatever either of the attorney or of petitioner, and simply granted an extended adjournment until after the new year so that the attorney could enter an in-patient addiction treatment program. Petitioner's case was reassigned out of Bay City, where the attorney had been arrested, to a new judge [Zatcoff, J.] in the Detroit courthouse.

A month later the attorney induced petitioner to sign a statement averring that he was aware of his attorney's felony cocaine arrest, and that he "requested" that the attorney not withdraw from the case. This statement was not revealed to any judge until after the verdict. The circumstances surrounding its making were never explored.

At no time did any judge in this case ever discuss with petitioner the implications of Jacobs's arrest: whether Jacobs, facing felony charges himself, would have the time or concentration to properly defend appellant, and whether appellant might want a different lawyer to represent him, one who was not himself tainted or distracted by serious

license-threatening drug charges.

The Sixth Circuit ruled that there is no *sua sponte* obligation for a trial judge to conduct such an inquiry [APP. p. 6].

Official on-the-record judicial intercession at this critical juncture was required, and for several reasons. To begin with, petitioner did not choose Jacobs in the first instance. Indeed, an indigent defendant eligible for assigned counsel, unlike one who has retained counsel of his own choosing, has no prerogative to choose which attorney on the assigned counsel panel shall represent him. This choice is entirely in the hands of the judiciary [*United States v. White*, 541 F.2d 1225 (6 Cir.1971)], and by necessary implication an indigent defendant has no unilateral power to discharge his attorney either.

Second, an attorney's arrest on serious drug charges is no minor event, either to himself or to those he represents. A defense attorney, suddenly thrust into the uncharacteristic role of a defendant, knows better than anyone what is at stake: substantial time diverted from practice to prepare to meet the charges; payment of legal fees for his own defense; possible loss of current, and future, clients, who might well feel distrustful of or embarrassed by being represented by an attorney himself charged with crime; potential professional disciplinary proceedings, with consequential sanctions, including suspension or revocation of his license; and loss of long-term income-earning potential.

But while the arrested attorney-defendant immediately understands the current and possible future implications of his own arrest, even the most sophisticated of his lay clients, their attentions wholly absorbed by their own pending charges, do not. The special implications that an arrest of an attorney might have to the attorney and to his clients are beyond the ken or experience of criminal defendants, and are especially remote from the thinking of a

defendant who, like Koehler, had no prior criminal experience himself, and whose livelihood---the simple buying and selling of auto parts---does not include regular contact with attorneys.

Since the client is unlikely to sense or understand the possible implications of his attorney's arrest, and how that arrest might affect the attorney's ability to single-mindedly defend him, someone must undertake the responsibility to explain these matters fully and candidly to him, to make sure that he understands them, and to offer him a chance to be heard on the matter in a way that counts.

The attorney himself is hardly in a position to do so. For one thing, faced with the possible loss of the client (and thus of payment under the Criminal Justice Act [18 U.S.C. §3006A]), it is contrary to the attorney's immediate pecuniary interest to give a particularly complete and impartial rendition of the implications of his own arrest. With his own criminal charges pending, moreover, the attorney's sensitivity to self-incrimination provides a further disincentive to candid discussion with his client. There is also the understandable inclination to minimize the seriousness of the arrest, its probable disposition and consequences, and the amount of time that he would be diverting to answer the charge, a minimization that an inexperienced lay client, wholly dependent upon his attorney for advice, would be overly vulnerable to. Moreover, it is unlikely that the inexperienced lay client would have the insight to pose appropriate and germane questions to the attorney.

The only functionary in a position to treat with the problem in a fair and complete fashion is a judge, whose non-partisan role well suits him to be the one to pose germane questions to the attorney, to explain matters fully and impartially to the client-defendant, and to be sure that

the client understands what his options might be.**

Having the judge intercede on the record at this juncture serves other values as well. The judiciary is the gate-keeper of the assigned counsel system. It is the judiciary that decides whether to assign counsel at all, and, having assigned counsel (the client having no say in precisely who is assigned), is obliged to keep its fingers gently on the pulse of the representation. That is not to say that the judge could or should second-guess every jot and tittle of an assigned attorney's mid-trial strategic choices; nor is it to suggest that the judge should automatically prohibit an arrested attorney from continuing the representation.

It is only to say that when something as threatening to the undiluted and undistracted fulfillment of an assignment as an arrest is brought to its attention, the judiciary must take steps to ensure both that the attorney previously assigned is, in fact, able to continue to render the

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**A modest inquiry of the attorney might well have revealed some troubling matters above and beyond the attorney's recent arrest that would have been germane on the issue of his fitness to continue, and upon petitioner's willingness to proceed with him. Michigan court records show that the attorney had been admonished by Michigan's attorney disciplinary group for failure to be adequately prepared for a criminal trial. His client in that case later sued him for malpractice. [Bay City, Michigan Circuit Court Docket #89-3251, Huizar v. Jacobs]. Another former client in a criminal matter had also filed a malpractice suit against him [Bay City Docket #92-3138-B NM, Janasik v. Jacobs]. Both cases were in active phases of litigation before and during petitioner's trial. The official records of the Michigan courts were judicially noticeable in the Sixth Circuit. *Rosic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 737 (6 Cir.1980).

appropriate level of service, and that the client has a full and complete grasp of the implications of what has happened to his assigned attorney, and how, if at all, that might impact upon his ability to defend.***

Where counsel is retained---chosen by the defendant---these matters might well be left to the resolution of the attorney and his client, lest the judge seem to be intruding on a professional relationship based upon mutual choice and agreement.

But both the dynamics of an assigned counsel/client relationship and its very origins are distinctly different, and

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***The record of counsel's performance on this case suggests that his mind was indeed elsewhere, as he offered only a pantomime of defense advocacy, and showed little effort to resist the government's desire to imprison his client, He made no pre-trial motions, not even a routine motion for a bill of particulars. He made no effort to redact the tape recordings, many of which made reference to the shady dealings of others, and which the government was able to use to forge a birds-of-a-feather argument; nor did he seek limiting conclusions regarding the allegedly counterfeit labels, when the agent was not qualified to state such conclusions. He sponsored two defense witnesses, who actually contradicted the defense and whose testimony was easily refuted by documentary evidence already at his disposal; these witnesses proved more valuable to the government than to the defense. He failed to seek a routine conspiracy instruction that might have availed his client. The only instruction he sought was an entrapment charge for Count III; this, however, was an afterthought, as entrapment was not mentioned in his opening, and did not reveal itself until the defense case was well underway, long after the entrapper (the agent) had already concluded his testimony. Counsel went through the motions of a defense, albeit without making many of them.

require a judge to explore--in detail, personally, and on the record---whether that relationship remains a viable one after he learns that a lawyer, assigned by his court to represent a defendant in his court, has been arrested for a felony.

Though this is an issue of apparent first impression and thus has not generated any conflict among the circuit courts of appeal, it is an issue that raises important questions about (a) the district court's Sixth Amendment responsibility to assure that indigent defendants are assigned counsel fit for the task of representation, and (b) the proper administration of the Criminal Justice Act [18 U.S.C. §3006A(b): "Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court...].

Either as matter of Sixth Amendment law or as a matter of exercising its supervisory powers over a vital facet of the administration of criminal trial justice, this Court ought to act on the concern that a federal trial judge, who knows that an attorney he has assigned has been arrested and is about to enter a drug cocaine treatment program, would allow that attorney to continue his representation without so much as asking the attorney a single question about his fitness to continue, or ensuring that the defendant has a full awareness not simply of the fact of the lawyer's arrest, but of the implications that arrest invariably has upon the attorney's ability to shoulder the burden of a singleminded defense effort.

An indigent defendant is wholly at the mercy of the district court to provide counsel fit for the task. An attorney whose drug habit is so out of control that he subjects himself to arrest and who needs a formal drug program to wean him away from his cocaine compulsion (as was the case here), cannot be allowed to continue his representation as though nothing has happened. Whatever may be the proper judicial response when a retained attorney's drug problems come to the court's attention, a different

obligation arises when the attorney is assigned, as the Congress, through 18 U.S.C. 3006A, has designated the district court to fill a gate-keeper role in selecting attorneys for indigent defendants.

In *Frazier v. Heebe*, 482 U.S. 641 (1987), this Court exercised its supervisory power to nullify a district court rule which unreasonably restricted the ability of attorneys to appear in that court. Here, petitioner would be asking this Court to exercise its supervisory power to announce a prophylactic rule requiring trial judges to be more restrictive in dealing with attorneys apparently unfit - by dint of very recent compulsive cocaine use known to the court - to continue with their assigned representation of indigent defendants. And, a case raising a comparable issue to the one at bar - whether a district court is obliged to conduct a searching inquiry of a defendant who wishes to proceed pro se - garnered two votes for certiorari a few years ago. *McDowell v. United States*, 484 U.S. 980 (1987) [White and Brennan, JJ., dissenting].

CONCLUSION

FOR THE ABOVE STATED REASONS, THIS COURT IS RESPECTFULLY REQUESTED TO ISSUE A WRIT OF CERTIORARI

Respectfully submitted

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No. 93-2062

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL KOEHLER,
Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed May 25, 1994

Before: BOGGS and SILER, Circuit Judges; and TIMBERS, Senior Circuit Judge*.

TIMBERS, Senior Circuit Judge. Appellant Koehler appeals from a conviction entered after a jury trial in the Eastern District of Michigan, Lawrence P. Zatkoff, District Judge. He was convicted on three counts of engaging in

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*Honorable William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

transactions involving stolen and counterfeit automobile parts.

On appeal, Koehler contends that the court erred in failing to conduct a pre-trial inquiry into the drug arrest of his assigned attorney; that the evidence was insufficient to warrant his conviction on Count Three; and that the court erroneously enhanced his sentence.

We affirm.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

This case arises from an undercover F.B.I. sting investigation into trafficking in stolen and counterfeit automobile parts. Undercover F.B.I. Agent Ronald Watson set up a business in Freeland, Michigan, in which he posed as a wholesale automobile parts broker. Between March 15, 1989 and April 2, 1990, Koehler and Watson engaged in numerous telephone conversations, secretly taped by Watson, in which Koehler indicated that he operated a sophisticated ongoing business dealing in stolen and counterfeit automobile parts. He conducted four such transactions with Watson.

Specifically, on April 3, 1989, Koehler sold Watson $3,380 worth of stolen axles; on May 15, 1989, Watson sold Koehler a $21,000 load of stolen spark plugs; on February 9, 1990, Watson sold Koehler 89 counterfeit air conditioner compressors for $2,670; and on April 2, 1990, Koehler gave Watson 107 counterfeit labels and 100 counterfeit containers. Koehler did not receive financial payment for the counterfeit labels and containers. Instead, the record establishes that Koehler provided the labels and containers in exchange for Watson providing him with a continuing supply of counterfeit air conditioner compressors.

In July 1992, Koehler was charged in a three-count indictment. Count One charged him with conspiring unlawfully to transport in interstate commerce stolen automobile parts with a value of $5,000 or more, knowing that they had been stolen, in violation of 18 U.S.C. §§ 371, 2314 (1988), and knowingly using a counterfeit mark in intentionally trafficking in automobile parts, labels, and containers, in violation of 18 U.S.C. § 2320 (1988). Count Two charged him with knowingly using a counterfeit mark in intentionally trafficking or attempting to traffic in approximately 89 air conditioner compressors, in violation of 18 U.S.C. § 2320. Count Three charged him with knowingly using a counterfeit mark in intentionally trafficking or attempting to traffic in approximately 107 labels and 100 containers, in violation of 18 U.S.C. § 2320.

On November 20, 1992, prior to trial, Koehler's assigned attorney was arrested by state authorities for possession of cocaine. On November 23, 1992, the attorney's drug arrest was placed on the record before Judge Cleland, the district court judge to whom the case originally was assigned. The attorney stated that he had discussed his drug problem with Koehler and that Koehler had not wanted the attorney to bring the matter to the court's attention. Judge Cleland granted a continuance so that Koehler's attorney could complete discovery and participate in an in-patient treatment program.

On December 23, 1992, Koehler signed a disclosure statement declaring that he was aware of the charge against his attorney and that he wished to continue to be represented by him. On January 5, 1993, the case was transferred to Judge Zatkoff who presided over the trial. On February 18, 1993, Koehler was convicted on all three counts after a jury trial.

Koehler subsequently retained new counsel. On April 26, 1993, Koehler filed a motion for a new trial pursuant to Fed. R. Crim. P. 33. He contended that he had received ineffective assistance of counsel at trial because

his trial attorney had been arrested on drug charges at the time of the trial. On May 12, 1993, the court held a hearing and announced an oral ruling denying the motion. The court stated that it had observed Koehler's attorney during the trial and that the attorney's performance had not been deficient.

On July 22, 1993, Koehler filed a renewed motion for a new trial. He raised four arguments that were not raised in his April 26, 1993 motion and that are not raised on this appeal.

On July 29, 1993, the court entered an order and opinion denying the renewed motion and held a sentencing hearing. Based on its finding that Koehler was "in the business" of dealing in stolen property, the court enhanced Koehler's sentence four levels pursuant to U.S.S.G. § 2B1.2(b)(4)(A) (1992). He was sentenced to 24-month terms of imprisonment on each count to be served concurrently, plus a 2-year term of supervised release, plus a $150 special assessment. This appeal followed.

II.

(A) COURT'S DUTY TO CONDUCT A PRE-TRIAL INQUIRY

Koehler contends that the court should have conducted a pre-trial inquiry into whether his assigned attorney was fit to conduct a competent defense and whether Koehler wished to continue being represented by an attorney who had been arrested on drug charges. He contends that the court's failure to conduct such an inquiry resulted in his receiving ineffective assistance of counsel at trial.

(1) *Timeliness of Koehler's Motion for a New Trial*

Koehler did not assert this contention until his April 26, 1993 motion for a new trial. Unless a motion for a new trial is based on newly discovered evidence, it must be filed within seven days of the verdict or within such further time as the court may fix during that seven-day period.

Fed. R. Crim. P. 33. If the motion is untimely, the court lacks jurisdiction to consider it on the merits. *United States v. Smith*, 331 U.S. 469, 475-76 (1947).

Koehler's April 26, 1993 motion for a new trial was filed more than two months after the February 18, 1993 jury verdict -- well past the Rule 33 seven-day limit. During that seven-day period, the court did not grant Koehler an extension of time in which to file his motion. Furthermore, Koehler's motion was not based on newly discovered evidence. Prior to trial, he signed a disclosure statement in which he acknowledged that he was aware of the felony charge against his attorney and stated that he wished to continue with that attorney. The facts supporting Koehler's claim were within his knowledge at the time of trial. *United States v. Seago*, 930 F.2d 482, 488-89 (6 Cir. 1991).

We hold that, since Koehler's motion for a new trial was untimely, the court lacked jurisdiction to consider it on the merits.

(2) *Merits of Koehler's Claim*

Koehler contends that the court had a duty to conduct a pre-trial inquiry *sua sponte*, which arose at the time the attorney's drug arrest was brought to its attention, rather than by any subsequent formal motion, objection, or request. According to Koehler, he was not required to file a Rule 33 motion to preserve his claim for appellate review. Even if we were to accept such contention (which we do not), we would reject his claim that the court had a duty to conduct such a pre-trial inquiry on the facts of this case.

Prior to trial, Koehler clearly was aware of his attorney's arrest. He had agreed to continue being represented by that attorney. On November 23, 1992, the attorney stated on the record before Judge Cleland that he had discussed his drug problem with Koehler who did not want him to bring the matter to the court's attention. On December 23, 1992, Koehler signed a disclosure statement that he was

aware of the charge against the attorney and wished to continue to be represented by that attorney. Although the record does not indicate that this disclosure statement was brought to the attention of the court, it confirms the accuracy of the attorney's November 23, 1992 representations to Judge Cleland.

Koehler contends that he agreed to continue to be represented by the attorney only because he was concerned that he could not get a continuance that would allow a new attorney sufficient time to prepare his defense. The record does not support this contention. At the same hearing at which Koehler's attorney informed the court of his drug arrest, the court granted a continuance so that the attorney could complete discovery and participate in an in-patient treatment program.

Furthermore, prior to trial, there was no indication that the attorney's drug arrest would create a conflict of interest between Koehler and the attorney. There was no nexus between Koehler's criminal charges and those of his attorney. Koehler and his attorney were not being prosecuted by the same office. Thus, there was no indication that the attorney would breach his duty of loyalty to Koehler. *Taylor v. United States*, 985 F.2d 844, 846 (6 Cir. 1993). Judge Zatkoff, who presided over Koehler's trial, specifically found at the May 12, 1993 hearing on the new trial motion that Koehler's attorney had conducted a competent defense. This finding indicates that the attorney's drug arrest did not result in a conflict of interest or in Koehler's receiving ineffective assistance of counsel.

Koehler nevertheless contends that we should impose retroactively a per se rule requiring reversal of his conviction because the court did not conduct a pre-trial inquiry into his attorney's fitness or into the sincerity of Koehler's desire to continue being represented by the attorney. We reject his contention.

We hold that, on the facts of this case, the court did not have a duty to conduct such a pre-trial inquiry.

(B) SUFFICIENCY OF THE EVIDENCE AS TO COUNT THREE

Koehler also contends that insufficient evidence supports his conviction on Count Three which charged that he knowingly used a counterfeit mark in intentionally trafficking or attempting to traffic in approximately 107 labels and 100 containers, in violation of 18 U.S.C. § 2320. Section 2320(d)(2) defines "traffic" as to "transport, transfer, or otherwise dispose of, to another, as consideration for anything of value". Koehler contends that, since Agent Watson never paid for the counterfeit labels and containers, the evidence did not prove that Koehler received "anything of value" and Koehler cannot be guilty under Count Three.

In reviewing a jury's verdict under a sufficiency of the evidence standard, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

The government did not assert that Koehler received financial payment. Instead, it asserted that Koehler provided the counterfeit labels and containers in exchange for Watson providing him with a continuing supply of counterfeit air conditioner compressors. Such "good will" can be considered a thing of value in the form of an intangible asset. *Newark Morning Ledger Co. v. United States*, 113 S. Ct. 1670, 1675-76 (1993).

Viewing the evidence in the light most favorable to the prosecution, *Jackson v. Virginia*, *supra*, 443 U.S. at 319, we believe that a rational trier of fact could have found beyond a reasonable doubt that Koehler supplied the counterfeit labels and containers in exchange for Watson's "good will" and that such "good will" constituted a thing of value.

We hold that sufficient evidence supported the jury's verdict as to Count Three.

(C) SENTENCING ENHANCEMENT

Koehler also contends that the court erred in enhancing his sentence pursuant to U.S.S.G. § 2B1.2(b)(4)(A) (1992). The Guidelines provide that, if the offense was committed by "a person in the business of receiving and selling stolen property, [an] increase by 4 levels" would be appropriate. U.S.S.G. § 2B1.2(b)(4)(A) (current version at U.S.S.G. § 2B1.1(b)(5)(B) (1993)). Koehler contends that this enhancement provision does not apply to him, since he allegedly was a legitimate businessman who, in his 24 years in the auto parts business, had engaged in only two transactions involving stolen property.

We recently held that, in deciding whether enhancement is warranted, the sentencing court must determine "(1) if stolen property was bought and sold, and (2) if the stolen property transactions encouraged others to commit property crimes". *United States v. Warshawsky*, Nos. 93-1345/1346/1473, slip op. at 22 (6 Cir. March 29, 1994). We believed that the enhancement was warranted, since the Warshawsky brothers' seven stolen property transactions encouraged others to commit property crimes. *Id.*

We explained there that the enhancement applies to a "fence" -- that is, a person who receives stolen property -- and not to a person who sells property that he himself has stolen because a fence encourages others to steal. *Id.* at 21. We reasoned that "[t]he Sentencing Commission has decided that fences deserve longer sentences than mere thieves because a sentence based solely on 'the amount of (stolen) property' recovered by the police 'is likely to underrepresent the scope of their criminality and the extent to which [the defendant] encourage[s] or facilitate[s] other crimes'." *Id.* at 20 (quoting U.S.S.G. § 2B1.2, comment. (backg'd)).

As in *Warshawsky*, the record in this case establishes that Koehler both bought and sold stolen automobile parts that

he did not steal himself. Although the prosecution proved only two stolen property transactions, the court found that Koehler's criminal activity was "not a one time thing, or a sporadic thing" but rather "was a part, at least a part of [Koehler's] business". This factual finding is supported by Koehler's many taped conversations with Watson in which Koehler indicated that he operated a sophisticated ongoing business dealing in stolen automobile parts. As in *Warshawsky*, such activity encouraged theft by others.

We hold that the court's four-level enhancement of Koehler's sentence pursuant to § 2B1.2(b)(4)(A) was proper.

III.

To summarize:

Koehler's motion for a new trial was untimely. On the facts of this case, the court did not have a duty to conduct a pre-trial inquiry into the attorney's fitness or into Koehler's desire to continue to be represented by him. The evidence was sufficient to support Koehler's conviction on Count Three. The court did not err in enhancing his sentence.

Affirmed.

Case No: 93-2062

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MICHAEL KOEHLER,
Defendant-Appellant

BEFORE: JUDGES BOGGS, SILER AND TIMBERS

Upon consideration of the petition for rehearing filed by the defendant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 94-580

In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL KOEHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly applied Sentencing Guidelines § 2B1.2(b)(4)(A) (Nov. 1992), which provides a four-level increase to the base offense level for offenses involving stolen property "[i]f the offense was committed by a person in the business of receiving and selling stolen property."

2. Whether the district court erred by failing to conduct on its own initiative an on-the-record inquiry into the fitness of petitioner's court-appointed counsel, who was arrested for possession of cocaine six weeks before petitioner's trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-580

MICHAEL KOEHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 24 F.3d 867.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1994. A petition for rehearing was denied on July 1, 1994. Pet. App. 10a. The petition for a writ of certiorari was filed on September 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conspiracy to transport

stolen automobile parts in interstate commerce and to use a counterfeit mark to traffic in goods, in violation of 18 U.S.C. 371, 2314, and 2320; and two counts of knowingly using a counterfeit mark to traffic in goods, in violation of 18 U.S.C. 2320. He was sentenced to 24 months' imprisonment, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner operated a wholesale automobile parts business based in Lake Mohegan, New York. FBI Agent Ronald Watson, posing as an auto parts broker, contacted petitioner concerning parts that petitioner had advertised for sale. In subsequent conversations with Watson, petitioner indicated that he operated an extensive business in stolen and counterfeit automobile parts. Their conversations resulted in four transactions: Watson purchased 52 stolen car axles from petitioner for $3,380; Watson sold petitioner a load of spark plugs, which Watson represented as stolen, for $20,550; Watson sold petitioner 89 reconditioned air conditioner compressors bearing counterfeit labels for $2,670; and petitioner gave Watson 107 counterfeit labels and 100 counterfeit boxes to induce Watson to provide additional air conditioner compressors. See Pet. App. 2a; Gov't C.A. Br. 5-13.

2. On July 30, 1992, a federal grand jury returned an indictment against petitioner based on those transactions. The district court appointed Stevens J. Jacobs as counsel for petitioner. On November 20, 1992, state authorities arrested Jacobs for possession of cocaine. Jacobs informed the district judge of the arrest, noting that he had discussed the matter with petitioner (who was present in court) and that petitioner had not wanted Jacobs to disclose the arrest to the court. The judge granted a continuance in petitioner's case and allowed

Jacobs to participate in an in-patient drug treatment program. Petitioner later signed a disclosure statement declaring that he was aware of the charge against Jacobs and that he wished to continue to utilize Jacobs as his counsel. On February 8, 1993, petitioner's trial commenced before a different district judge, and ten days later petitioner was convicted on all counts charged in the indictment. At no time before or during the trial did petitioner voice any concerns about his attorney's arrest or representation. Pet. App. 3a; Gov't C.A. Br. 2-3.

3. Following his conviction, petitioner obtained new counsel, who filed a motion for a new trial pursuant to Fed. R. Crim. P. 33. Petitioner's new attorney contended that petitioner had received ineffective assistance of counsel at trial because of his attorney's drug use and arrest. Pet. App. 3a-4a. The district judge denied the motion, stating that Jacobs' "performance was not deficient. I personally watched him. I think that there was an adequate development of the evidence. The adversarial system was not compromised. [Jacobs] offered the best defenses that he had available to him." 5/12/93 Tr. 16. Petitioner filed a second motion for a new trial, which was also denied. See Pet. App. 4a.

At sentencing, the district court determined that petitioner's base offense level was four. See Sentencing Guidelines §§ 2B1.2, 2X1.1 (Nov. 1992). The court then adjusted the base offense level to take account of the specific offense characteristics. The court imposed an eleven-level increase, because the retail value of the auto parts involved in this case exceeded $350,000. See Guidelines §§ 2B1.1(b)(1)(L), 2B1.2(b)(1) (Nov. 1992). The court imposed an additional four-level increase, because petitioner was "in the business of receiving and selling stolen property." Guidelines § 2B1.2(b)(4)(A) (Nov. 1992). The court granted a three-level reduction, because

petitioner had not completed all the acts necessary to achieve the objects of the conspiracy. See Guidelines § 2X1.1(b)(2) (Nov. 1992). Those adjustments yielded a total offense level of 16. That offense level, combined with petitioner's Criminal History Category of I, yielded a sentence range of 21 to 27 months' imprisonment. See Pet. App. 4a; 7/29/93 Tr. 14.

4. On appeal, petitioner argued that the district court erred by failing to undertake a pre-trial inquiry into whether his assigned counsel was able to conduct a competent defense and into whether petitioner wished to continue being represented by an attorney who had been arrested on drug charges. The court of appeals concluded that the argument was procedurally barred, because petitioner first raised the issue in an untimely Rule 33 motion for a new trial. The court also rejected the argument on the merits, concluding that: (a) petitioner was aware before trial of his attorney's arrest and of the possibility of obtaining a continuance to obtain new counsel; (b) there was no indication before trial that the attorney's arrest would create a conflict of interest with petitioner, because their cases were factually unrelated and were being prosecuted by different sovereigns; and (c) petitioner had received effective assistance of counsel. Pet. App. 4a-6a.

Petitioner also challenged the district court's calculation of his sentence. Petitioner contended that the stolen-property transactions that led to his conviction were isolated incidents insufficient to support imposition of the "in the business" offense level adjustment set out in Guidelines § 2B1.2(b)(4)(A) (Nov. 1992). The court of appeals rejected that argument. The court ruled that those transactions, taken in the context of petitioner's tape-recorded statements to Watson, indicated that petitioner "operated a sophisticated ongoing business

dealing in stolen automobile parts" that justified the adjustment. Pet. App. 8a-9a (citing *United States* v. *Warshawsky*, 20 F.3d 204, 215 (6th Cir. 1994)).[1]

ARGUMENT

1. Petitioner renews his contention (Pet. 4-6) that the district court erroneously applied Guidelines § 2B1.2(b)(4)(A) (Nov. 1992), which provides a four-level adjustment to the base offense level for offenses involving stolen property if the offense was committed "by a person in the business of receiving and selling stolen property." Petitioner argues that the stolen property transactions that the government proved at trial were insufficient to warrant imposition of the "in the business" adjustment. The court of appeals correctly rejected that contention, and its decision does not conflict with the decision of any other courts of appeals.

The district court's offense level adjustment in this case is amply supported by the evidence. As the court of appeals explained (Pet. App. 9a), the government showed that petitioner had engaged in multiple stolen-property transactions and that he had made numerous admissions concerning his knowledge and ongoing involvement in a

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[1] Petitioner also challenged the sufficiency of the government's evidence to support one of the counts of conviction. The court of appeals rejected petitioner's contention that the evidence was insufficient to show that he had transferred the counterfeit labels and boxes "as consideration for anything of value." See 18 U.S.C. 2320(d)(2). Pet. App. 7a-8a. Petitioner does not challenge that ruling here.

stolen auto parts business.[2] Petitioner's conversations with Watson demonstrate that the stolen-property transactions were not isolated incidents, but were part of his continuing business. The courts below agreed that the evidence was sufficient to establish that petitioner was "in the business," and there is no warrant for this Court to reconsider that matter. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).[3]

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[2] For example, petitioner advised Watson during their first telephone conversation that he could move parts "nice and quietly" and did not sell to dealers so as to avoid "flack." See Gov't C.A. Br. 36. During subsequent conversations, petitioner displayed eagerness to obtain additional stolen goods. He expressed an interest when Watson told him that he had a contact who could obtain parts stolen from an auto plant, and petitioner later told Watson to "stay on top of" his source in case additional stolen parts became available. *Id.* at 9-10, 35. Petitioner saw a sample of one of these stolen parts on Watson's desk and told Watson that, depending on the price and quantities available, he would be interested in purchasing a number of them. *Id.* at 36. Petitioner's statements also demonstrated considerable expertise and experience in the stolen parts market. He conversed with Watson about such topics as the need to take precautions to avoid discovery and the advantages of stealing parts from scrap yards. *Id.* at 7-8.

[3] Other courts of appeals have reached comparable conclusions based on similar evidentiary records. See *United States* v. *Rosa*, 17 F.3d 1531, 1551-1552 (2d Cir.) ("Rosa also revealed familiarity with the need to resell goods that bore serial numbers outside of New York * * *. Further, numerous recorded conversations demonstrated that Rosa was willing to deal in a broad variety of stolen goods for resale * * *. The court could reasonably infer from this evidence that [the defendants] were 'in the business' of reselling stolen goods."), cert. denied, 115 S. Ct. 211 (1994); *United States* v. *Russell*, 913 F.2d 1288, 1294 (8th Cir. 1990) (evidence that defendant had told an informant that he could supply stolen goods "could reasonably lead the district court to conclude that

Petitioner contends that the Sixth Circuit's decisions in this case and in *United States* v. *Warshawsky*, 20 F.3d 204 (1994), conflict with the First Circuit's decision in *United States* v. *St. Cyr*, 977 F.2d 698 (1992), and the Third Circuit's decision in *United States* v. *King*, 21 F.3d 1302 (1994). According to petitioner, the First and Third Circuits apply a "nuanced multi-factored analysis" (Pet. 4), while the Sixth Circuit "seized upon only a single factor—whether the defendant himself stole the property he later sold—to determine the applicability of the enhancement" (Pet. 5). Petitioner's characterization of the Sixth Circuit's decision is debatable, but in any event the outcome in this case would be the same under any of the cases petitioner cites. The evidence here—which showed that petitioner "operated a sophisticated ongoing business dealing in stolen automobile parts" (Pet. App. 9a)—is sufficient to satisfy the First and Third Circuit's "totality of the circumstances" test. See *King*, 21 F.3d at 1306-1308; *St. Cyr*, 977 F.2d at 703; see also *Warshawsky*, 20 F.3d at 215; *United States* v. *Esquivel*, 919 F.2d 957 (5th Cir. 1990).

Moreover, even if this case presented a square conflict among the courts of appeals, there would be no warrant for the Court to review the matter. As this Court observed in *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991), the Sentencing Commission has a statutory duty "periodically [to] review and revise" the Guidelines, 28 U.S.C. 994(*o*), and is responsible for "mak[ing] whatever clarifying revisions to the Guidelines conflict-

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[defendant] was in the business of selling stolen property"), cert. denied, 500 U.S. 906 (1991).

ing judicial decisions might suggest." *Braxton*, 500 U.S. at 348.[4]

2. Petitioner also contends (Pet. 7-13) that the district court erred in failing to conduct *sua sponte* a pre-trial inquiry into whether his assigned counsel was fit to conduct a competent defense and whether petitioner wished to continue being represented by him. Petitioner does not appear to contest the court of appeals' conclusion that his challenge was procedurally barred because petitioner first raised it through an untimely Rule 33 motion for a new trial. See Pet. App. 4a-5a. In any event, the court of appeals correctly rejected petitioner's argument on the merits.

The record in this case demonstrates that petitioner had no qualms with his trial counsel's representation until after his conviction. Petitioner concedes that he was aware of his attorney's arrest before trial. Pet. 7. He did not dispute Jacobs' statement in open court that Jacobs had discussed the drug issue with petitioner. See 11/23/92 Tr. 2, 5-6. Petitioner signed a disclosure statement before trial stating that petitioner was aware of the charge against Jacobs and that he did not wish Jacobs to discontinue acting as petitioner's counsel. Pet. App. 3a. Petitioner made no objection to Jacobs' representation until April 26, 1993, more than two months after the jury returned its verdict. *Id.* at 4a-5a.

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[4] Since the district court's decision in this case, the Sentencing Commission has recodified the "in the business" offense level adjustment by consolidating it with Guidelines § 2B1.1 and revising the background commentary. See United States Sentencing Comm'n, *Guidelines Manual*, App. C, at 303-304 (Nov. 1993) (amend. 481, eff. Nov. 1, 1993). Those changes may resolve any tension that might exist among the lower courts concerning application of the "in the business" adjustment.

The record also demonstrates that petitioner received adequate representation. The court of appeals properly concluded that "there was no indication that [Jacobs'] drug arrest would create a conflict of interest between Koehler and [his] attorney." Pet. App. 6a.[5] Furthermore, the courts below both concluded that petitioner had received effective assistance of counsel at trial. *Ibid.*[6]

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[5] This is not a case in which defense counsel was implicated in the very crimes alleged against his client, which presents the risk that "a vigorous defense might uncover evidence of the attorney's own crimes, and the attorney could not give unbiased advice to his client about whether to testify or whether to accept a guilty plea." *Mannhalt* v. *Reed*, 847 F.2d 576, 581 (9th Cir.), cert. denied, 488 U.S. 908 (1988). Nor is this a case in which the same authorities prosecuted both defense counsel and his client, so that counsel could conceivably compromise representation of his client to obtain favorable treatment in his own case. *Taylor* v. *United States*, 985 F.2d 844, 846 (6th Cir. 1993) (per curiam). Rather, Jacobs' crime was factually unrelated and was prosecuted from the outset exclusively by state authorities. Accordingly, there is no basis in the record for concluding that petitioner and Jacobs had divergent interests "with respect to a[ny] material factual or legal issue or to a course of action." *Winkler* v. *Keane*, 7 F.3d 304, 307 (2d Cir. 1993) (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 356 n.3 (1980)), cert. denied, 114 S. Ct. 1407 (1994).

[6] Petitioner bases his ineffective assistance contention on five claims of attorney error. See Pet. 11 n. * * *. He raised only one of those claims—concerning Jacobs' failure to request an instruction that a defendant could not conspire with a government agent—before the district court. Gov't C.A. Br. 26; see Mot. for New Trial 2-4 (Apr. 26, 1993); Renewed Mot. for New Trial July 1-2 (July 22, 1993). The district court evaluated that claim under the test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984), and rejected it, finding that petitioner "has failed to prove either of the elements necessary to find ineffective assistance of counsel." Op. and Order Deny. Renewed Mot. for New Trial 4 (July 29, 1993). By failing to raise the other four claims in the district court, petitioner has failed to preserve them

This Court has recognized that the district courts and the courts of appeals have primary responsibility for resolving claims of ineffective representation. See *Burger* v. *Kemp*, 483 U.S. 776, 785 (1987). When those courts have found that trial counsel has performed his or her duties competently, this Court is properly reluctant to "substitut[e] speculation for their considered opinions." *Ibid.*

There is no merit in petitioner's suggestion (Pet. 11-12) that this Court should impose a per se requirement that lower courts conduct an on-the-record inquiry into the fitness of counsel whenever those courts learn that court-appointed counsel has been implicated in a felony. The lower courts are capable of dealing with the unusual situation presented here on a case-by-case basis. The per se rule proposed by petitioner would add little to the Sixth Amendment protections that defendants currently enjoy. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668 (1984); *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980); *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). At the same time, it would require reversal in cases, such as this one, in which the courts below concluded that the defendant received adequate assistance of counsel. As petitioner concedes, the duty he seeks to impose on the courts presents "an issue of apparent first impression and thus has not generated any conflict among the circuit courts of appeal." Pet. 12. There is no reason for the Court to address the issue at this time.

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for review. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1994